

JAN - 5 2007

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR: 5691

DATE COMPLAINT FILED: December 5, 2005

DATE OF NOTIFICATION: December 9, 2005

LAST RESPONSE RECEIVED: January 23, 2006

DATE ACTIVATED: August 14, 2006

EXPIRATION OF SOL: April 2010

COMPLAINANT:

Carol Earnhardt, Manager,
Brian Kennedy for Congress

RESPONDENTS:

Michael L. Whalen
Whalen for Congress and Kirk E. Whalen, in his
official capacity as treasurer
Iowa Machine Shed Co.
Carmen Darland (Heart of America Restaurants &
Inns, Inc.)
Victory Enterprises, Inc.
Brian Dumas (Victory Enterprises, Inc.)
Steve Grubbs (Victory Enterprises, Inc.)

RELEVANT STATUTES:

2 U.S.C. § 434(b)
2 U.S.C. § 434(f)
2 U.S.C. § 441a
2 U.S.C. § 441b
2 U.S.C. § 441d(a)
11 C.F.R. § 100.29
11 C.F.R. § 100.22
11 C.F.R. § 109.21
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED: FEC Disclosure Reports

OTHER AGENCIES CHECKED: U.S. Patent and Trademark Office
Iowa Secretary of State

I. INTRODUCTION

This matter concerns alleged coordination between Whalen for Congress ("the Committee"), which is Michael Whalen's 2006 campaign committee for the U.S. House of Representatives, and the Iowa Machine Shed Company ("Machine Shed"), Whalen's restaurant chain. Complainant, Carol Earnhardt of the Brian Kennedy for Congress committee, alleged that Machine Shed paid for and produced a restaurant advertisement, known as the "Best of Iowa" ad, which was intended to benefit Whalen's congressional campaign because the Machine Shed advertisement used images of Whalen and themes similar to those used by his campaign. The complainant also alleged that Machine Shed hired one of the Committee's campaign consultants, Victory Enterprises, Inc. ("Victory Enterprises"), to create the advertisement and that Victory Enterprises' employees and campaign volunteers appeared in the advertisement.¹ The complaint alleges that the advertisement constitutes a prohibited in-kind contribution to Whalen's campaign that was not properly disclosed to the public in reports filed with the Commission, failed to include any disclaimers and also failed to comply with the "Stand by Your Ad" requirements of the Federal Election Campaign Act of 1971, as amended ("the Act").

The advertisement contained footage with images of farming equipment, including John Deere tractors and a boy playing with John Deere toys, images of Whalen and his restaurant and contained references to the "Iowa farmer." As discussed in detail below, it does not meet the content element of the coordinated communication test, and the allegations concerning the conduct element are not sufficient to warrant an investigation in this matter. Further, the advertisement does not expressly advocate Whalen's candidacy, and because of the dates that it

¹ According to its website, Victory Enterprises is a "technology communications company that provides both Internet services and political communication services." See <http://www.victoryenterprises.com/>.

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aired, the advertisement does not qualify as an electioneering communication. Therefore, we recommend that the Commission find no reason to believe that the Machine Shed made, or that the Committee knowingly received, a prohibited in-kind contribution in the form of a coordinated television advertisement. We further recommend that the Commission find no reason to believe that any of the other respondents violated the Act.²

II. FACTUAL BACKGROUND

Mike Whalen was a candidate for the U.S. House of Representatives 1st Congressional District of Iowa in the 2006 Republican Primary held in June 2006.³ In addition, for the past 28 years Whalen has been the owner of the Machine Shed restaurant chain operating in various locations throughout the Midwest. <http://www.machineshed.com/restaurants/index.asp>.

The thirty-second advertisement at issue in this matter opens with images of a farm field and men tossing a bale of hay. Complaint, Attachment 1; Machine Shed Response, Attachment 1.⁴ Whalen appears in the next scene standing in a restaurant, along with images of restaurant patrons and close-up shots of food. The script of the advertisement reads as follows:

Whalen (voice over):

The Machine Shed was founded on a simple premise: make sure the Iowa farmer is proud of the meals we serve.

Whalen appears on screen:

² In its response to the complaint, Machine Shed explained, and we have confirmed through the U.S. Patent and Trademark Office and the Iowa Secretary of State websites, that Heart of America Restaurants & Inns is a registered trademark. See Machine Shed Letter dated December 22, 2005; Machine Shed Response to Complaint, p. 1; <http://www.uspto.gov>; <http://www.sos.state.ia.us/>. However, "Heart of America Management, L.L.C." ("Heart of America"), a limited liability company, is a legal entity covered under the Act. Therefore, this Report will address the liability of Carmen Darland as an agent of Heart of America Management, L.L.C. Heart of America is Machine Shed's parent company.

³ Whalen filed his Statement of Candidacy with the Commission on February 4, 2005.

⁴ The same counsel represents Michael Whalen, Carmen Darland, Brian Dumas, the Committee, and the Machine Shed. They filed a joint response to the complaint, which will be referred to as the "Machine Shed Response" in this Report.

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1 Hi, I'm Mike Whalen. The Iowa Machine Shed is turning 27 years old this year.
2 But our award-winning juicy pork chops, our USDA choice steaks and our
3 homemade from scratch pies and soups are getting better than ever. Drop by the
4 Iowa Machine Shed just off of Interstate 80 in Davenport and Des Moines. We'll
5 look forward to sharing the best that Iowa agriculture has to offer.
6

7 Complaint, Attachment 1 (DVD); Machine Shed Response, Attachment 1(DVD). The
8 advertisement does not make reference to Whalen as a candidate and there are no campaign
9 materials visible in any of the scenes. The available information appears to show that the "Best
10 of Iowa" ad aired between April and December 2005.⁵

11 The Respondents argue that no coordination took place. Carmen Darland (Heart of
12 America's Vice President for Marketing) developed the idea for the "Best of Iowa"
13 advertisement in 2000 and contracted with Victory Enterprises to produce the advertisement in
14 the Fall of 2004. See Machine Shed Response, p. 5. In its response to the complaint, Victory
15 Enterprises explains that company President, Steve Grubbs, met with Darland in the Fall of 2004
16 to discuss pay per click internet search advertising for the Machine Shed and also discussed
17 production of the "Best of Iowa" ad. Victory Enterprises Response to Complaint ("Victory
18 Enterprises Response"), p. 2. Victory Enterprises explains that it produced the advertisement
19 more than a year before the primary, and that it then turned the advertisement over to Heart of
20 America for placement. *Id.* See also, Machine Shed Response, p. 5. However, Victory
21 Enterprises' response does not provide exact dates when the advertisement was produced or the

⁵ In an advisory opinion request filed with the Commission, Machine Shed provided these dates and explained that the advertisement was pulled from the airwaves in December 2005 as a result of the complaint filed with the Commission. See Machine Shed Advisory Opinion Request ("Machine Shed AO Request") dated February 13, 2006. This Office informed Machine Shed that its letter to the Commission did not qualify as an advisory opinion request because a related enforcement action was still pending. See Letter from the Office of General Counsel, dated February 13, 2006.

1 date when it was turned over to Carmen Darland, but does state that it began providing
2 consulting services to the Committee in January 2005.⁶ Victory Enterprises Response, p. 2.

3 Respondents explain that the images and themes used in the "Best of Iowa" ad are the
4 same as those that have been used in Machine Shed advertising for many years. Machine Shed
5 Response, pp. 3-5; 8-11 and Attachment 1 (DVD); Victory Enterprises Response, pp. 1-2. They
6 further explain that Whalen does not exercise daily control over Machine Shed advertisement
7 content and placement, and Whalen, himself, has been quoted as stating that "we have a pretty
8 large company and I don't micromanage the marketing." Machine Shed Response, p. 5;
9 Complaint, Attachment D.

10 In support of their contention that no coordination took place, Respondents provided a
11 DVD containing a sample of prior Machine Shed television advertisements from 1989 through
12 2002 and another DVD containing a sample of radio advertisements. Machine Shed Response,
13 Attachments 1 & 2. Those prior Machine Shed advertisements also contain farming themes and
14 make statements, such as "the Heart of America," "dedicated to the American farmer," and
15 "family farmers." In addition, all the advertisements feature Mike Whalen either on screen or in
16 a voice over. *See Id.*

17 **III. LEGAL ANALYSIS**⁷

18 Based on the available information and as analyzed below, the "Best of Iowa" ad does not
19 appear to be a prohibited in-kind contribution to the Committee. The advertisement does not

⁶ A news report attached to the Complaint states that the advertisement was filmed in March 2005, but does not specify the source of that information. *See* Complaint, Attachment G.

⁷ The events relevant to this matter took place prior to the Commission's enactment of revised coordination regulations on June 8, 2006. Therefore, all references to Commission regulations refer to those that were in effect during the relevant time period prior to the revised regulations.

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1 satisfy the content prong of the coordination test. As such, disclosure of any expenditures related
2 to the advertisement was not required.

3 **A. Coordination Allegation**

4 A payment for a coordinated communication is an in-kind contribution to the candidate's
5 authorized committee with which it is coordinated and must be disclosed as an expenditure made
6 by that candidate's authorized committee.⁸ 11 C.F.R. § 109.21(b)(1). Further, in-kind
7 contributions to federal candidates or their committees are subject to the limitations, source
8 prohibitions, and disclosure requirements of the Act. *See, e.g.*, 2 U.S.C. §§ 434(b), 441a and
9 441b. Because Machine Shed is a corporation, it is prohibited from making any contribution to
10 the Committee. *See* 2 U.S.C. § 441b.

11 In order to be a coordinated communication, the "Best of Iowa" ad would have to satisfy
12 a three-pronged test: (1) payment by a third party; (2) satisfaction of one of four "content
13 standards;⁹ and (3) satisfaction of one of five "conduct" standards.¹⁰ 11 C.F.R. § 109.21.

14 Although Machine Shed admits that it paid for the production and airing of the "Best of Iowa"

⁸ The Act defines expenditures by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents" as in-kind contributions. 2 U.S.C. § 441a(a)(7)(B)(i).

⁹ The "content" standards include: (1) an electioneering communication, as defined in 11 C.F.R. § 100.29(a); (2) a public communication that republishes, disseminates, or distributes campaign materials prepared by the candidate; (3) a communication that expressly advocates the election or defeat of a clearly identified federal candidate; and (4) certain public communications that refer to a clearly identified federal candidate, is publicly distributed or disseminated 120 days or fewer before a primary or general election, and is directed to voters in the jurisdiction of the clearly identified candidate. 11 C.F.R. § 109.21(c).

¹⁰ The conduct standards include: (1) communications made at the request or suggestion of the relevant candidate or committee; (2) communications made with the material involvement of the relevant candidate or committee; (3) communications made after substantial discussions between the person paying for the communication and the clearly identified candidate; (4) the use of a common vendor; and (5) the actions of a former employee or independent contractor. 11 C.F.R. § 109.21(d)(1)-(6).

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ad, thereby satisfying the payment element of a coordinated communication, the content element is not satisfied in this matter. *See* Machine Shed Response, p. 5.

It appears that the "Best of Iowa" ad stopped airing in December 2005, which was more than 120 days before the June 6, 2006 primary election in Iowa. As such, the advertisement would not meet the content standards of the coordinated communication test as an electioneering communication or public communication within 120 days of the primary election.¹¹ 11 C.F.R. § 109.21(c)(1) and (4). Further, the advertisement does not appear to expressly advocate the election of Whalen as a federal candidate. Although Whalen appears and identifies himself by name in the advertisement, the advertisement itself concerns the Machine Shed restaurants and makes no mention of his candidacy. The advertisement contains no words, such as those set forth in 11 C.F.R. § 100.22(a), urging the election of Whalen. In addition, there is no electoral portion to the advertisement. 11 C.F.R. § 100.22(b). Rather, on its face, the communication is an advertisement for the Machine Shed restaurants and not for Whalen's campaign.

Further, although the complaint alleges that the advertisement uses some of the same themes and images as those used by the candidate in his campaign advertisement, the "Best of Iowa" ad does not republish any of the candidate's campaign materials. 11 C.F.R. § 109.21(c). As discussed *supra*, Machine Shed has been using similar themes and images in its advertisements, and has featured Whalen in its advertisements, since 1989. *See* Machine Shed Response, Attachment 1 (DVD). For all these reasons, the content standard is not satisfied.

The complaint further speculates as to the material involvement of Steve Grubbs and Victory Enterprises, and alleged substantial discussions they might have had as agents of the

¹¹ An electioneering communication is a "broadcast, cable or satellite communication that . . . refers to a clearly identified candidate for Federal office" and is "publicly distributed . . . within 30 days before a primary . . ." 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29(a).

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1 Committee about production of the advertisement. Complaint, pp. 7-8. However, even if the
2 conduct standard were to be satisfied, coordination cannot exist without the content standard also
3 being satisfied. Nevertheless, there is no evidence to show that Whalen or agents of his
4 campaign were involved with decisions pertaining to the production of the "Best of Iowa" ad.
5 Whalen denies involvement in the production and placement of the Machine Shed advertisement.
6 Machine Shed Response, p. 5. Further, at the time that Machine Shed engaged the services of
7 Victory Enterprises, Victory Enterprises had not yet started working for the campaign and the
8 mere presence of a common vendor is not sufficient to satisfy the conduct prong of the
9 coordinated communication test.¹² See Explanation and Justification, *Coordinated and*
10 *Independent Expenditures*, 68 Fed. Reg. 421, 437 (Jan. 3, 2003).

11 Based on the available information that the Committee made its first disbursements to
12 Victory Enterprises in March 2005 and the "Best of Iowa" ad first aired in April 2005, it appears
13 there was some overlap between the production of the advertisement and Victory Enterprises
14 providing services to the Committee. Thus, there remains a possibility that the vendor could
15 have used information relating to the campaign in the production of the "Best of Iowa" ad.
16 Although, as discussed *supra*, the themes and style used in the "Best of Iowa" ad remained
17 consistent with the Machine Shed's ads from previous years and there was no reference to
18 Whalen's candidacy in the advertisement. However, even if Victory Enterprises did have an

¹² The use of a common vendor in the creation, production or distribution of a communication satisfies the conduct standard only if certain criteria are met, namely: that the person paying for the communication contracts with, or employs, a "commercial vendor" to create, produce or distribute the communication; that the commercial vendor has a previous or current relationship with the candidate that puts the commercial vendor in a position to acquire information about the campaign plans, projects, activities or needs of the candidate during the current election cycle; and that the commercial vendor uses or conveys to the person paying for the communication information about the candidate's campaign plans, projects, activities, or needs, or information previously used by the commercial vendor in serving the candidate or political party committee, to the person paying for the communication, and that information is material to the creation, production or distribution of the communication. See 11 C.F.R. § 109.21(d)(4).

1 opportunity to convey campaign information to Machine Shed, the advertisement still does not
2 satisfy any of the elements of the content standard of the coordinated communication test of the
3 Act. In particular, the advertisement stopped airing more than 120 days before the June 6, 2006
4 primary election, and it does not expressly advocate Whalen as a federal candidate. Thus, even if
5 the conduct prong of the coordinated communication test were satisfied, the advertisement does
6 not sufficiently meet the remaining requirements for a coordinated communication to warrant an
7 investigation.

8 **B. Alleged Reporting and Disclaimer Violations**

9
10 If there was no in-kind contribution by Machine Shed to the Committee related to the
11 advertisement, the Committee was not required to disclose it in reports filed with the
12 Commission. 2 U.S.C. § 434(b). Further, because the advertisement in question was not paid for
13 by the Committee, did not expressly advocate the election or defeat of the candidate, did not
14 solicit contributions, and was not an electioneering communication, there appears to be no
15 violations of the disclaimer and "Stand by Your Ad" requirements of the Act. 2 U.S.C.
16 § 441d(a); 110 C.F.R. § 110.11.

17 **C. Conclusion**

18 We recommend that the Commission find no reason to believe that: Michael Whalen;
19 Whalen for Congress and Kirk Whalen, in his official capacity as treasurer; Iowa Machine Shed
20 Co., Inc.; Carmen Darland; Brian Dumas; Steve Grubbs; and Victory Enterprises, Inc. violated
21 the Act as it pertains to the "Best of Iowa" ad.
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IV. RECOMMENDATIONS

1. Find no reason to believe that Whalen for Congress and Kirk E. Whalen, in his official capacity as treasurer, violated 2 U.S.C. § 441b, by knowingly accepting a prohibited in-kind contribution in the form of a coordinated communication from the Iowa Machine Shed Co.
2. Find no reason to believe that Michael Whalen, Iowa Machine Shed Co., Carmen Darland, Brian Dumas, Steve Grubbs, and Victory Enterprises, Inc. violated 2 U.S.C. § 441b, by making a prohibited in-kind contribution in the form of a coordinated communication with Whalen for Congress.
3. Approve the appropriate letters.
4. Close the file.

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11/5/07
Date

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